Reversed Judge Davis
Judge Miller
Clerk

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~275.~~ 144

THE MERCHANTS' MUTUAL INSURANCE COMPANY OF NEW ORLEANS, PLAINTIFF IN ERROR,

vs.

ASAHEL P. LYMAN AND DAVID SWINERTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

**FILED NOVEMBER 11, 1871.**

Dec. 2. 1872

# SUPREME COURT OF THE UNITED STATES

## No. 375.

THE MERCHANTS' MUTUAL INSURANCE COMPANY OF NEW ORLEANS, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

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1 United States circuit court, fifth circuit and district of Louisiana.

ASAHEL P. LYMAN AND DAVID SWINERTON
*vs.*
MERCHANTS' MUTUAL INSURANCE COMPANY of New Orleans. } No. 6125.

*Petition.—Filed March 3rd*, 1870.

To the honorable the judges of the circuit court of the United States for the fifth judicial circuit, holding sessions in the district of Louisiana:

The petition of A. P. Lyman and David Swinerton, respectfully shows:

That your petitioners are, severally, citizens of the State of Wisconsin; that the Merchants' Mutual Insurance Company, of New Orleans, a corporation organized under the laws of, and domiciliated in, the State of Louisiana, and a citizen of the State of Louisiana, is justly and truly indebted unto your petitioners in the sum of ($12,000,) twelve thousand dollars, as follows: Three equal fourth parts of said sum to your
2 petitioner Lyman, and the remaining one-fourth equal part of said sum to your petitioner Swinerton, for this, to wit:

That, on the 30th day of October, A. D. 1869, the said insurance company issued to petitioners a policy of insurance, which is hereto annexed and made part of this petition, whereby for the premium of $420 they insured your petitioners in the proportions above set forth, upon the brig "Sailor Boy," her tackle, apparel, and other furniture, for the period of two months, and until the 1st day of January, 1870, in the sum of twelve thousand dollars.

That, on the 15th of December, A. D. 1869, Messrs. Higby & Son, as the agents of your petitioners, applied to the said insurance company to renew the said policy of insurance upon the said "Sailor Boy," her tackle, apparel, and other furniture, for the period of three months from the 1st of January, A. D. 1870; that is to say, to insure your petitioners in the sum of $12,000, in the proportion above set forth, upon the brig "Sailor Boy," her tackle, &c., for the period of three months from said first day of January, A. D. 1870.

That the said insurance company took time to consider the terms upon which they would make such renewal, and, on the 24th day
3 of December, A. D. 1869, communicated and proposed to your petitioners, through their said agents, that they would make such renewal for said last-mentioned period, for the premium of $600.00.

That, on the 31st day of December, A. D. 1869, your petitioners, through their said agents, accepted the said proposition of the said insurance company, for said renewal, for the period of three months, and that said company, on said 31st day of December, A. D. 1869, agreed with your petitioners that they would renew said policy of insurance upon the said brig "Sailor Boy," her tackle, &c., insuring to your petitioners, in case of loss within the said period of three months, the said sum of $12,000, in the proportions above mentioned; that they would make out the renewed policy of insurance and send it around to the office of said Messrs. Higby & Son, said agents of your petitioners, and receive, upon the delivery of said renewed policy, the premium agreed upon, viz, the sum of six hundred dollars; that, on the 15th day of January, A. D. 1870, said petitioners, through their said agents, sent to the said insurance company, for the said renewed policy of insur-

4 ance so agreed to be sent to them, and paid the premium agreed upon, viz, the said sum of six hundred dollars, and that said company issued to your petitioners, under and by virtue of said agreement to renew the insurance, the policy hereto annexed, and marked "B;" that said policy marked "B" is but a compliance with, and a formal statement of, the agreement to renew the insurance made and entered into on the 31st of December, A. D. 1869, as above set forth.

That, on the 8th day of January, A. D. 1870, the said brig "Sailor Boy," her tackle, apparel, and other furniture, being bound on a voyage from New York to New Orleans, became, by the perils of the sea, a total loss, and was so actually lost; that the proper proofs of said loss have been submitted to the said company, and payment of the said $12,000 so becoming due and payable under the said agreement to renew the said policy amicably demanded by said petitioners, which was refused; that, at the time of all the premises hereinbefore mentioned, your petitioners, A. P. Lyman, was the sole owner of three-fourths; that your petitioner D. Swinerton, the sole owner of one-fourth of said brig, and that she was worth much above $18,000,

5 her insured value.

Wherefore your petitioners pray that the said Merchants' Mutual Insurance Company of New Orleans may be cited to appear and answer this petition, and that, after due proceedings, your petitioners may have judgment against said company for the said sum of $12,000, with interest from judicial demand, in the proportions above-mentioned; that is to say, your petitioner A. P. Lyman, three-fourths, and your petitioner D. Swenerter, one-fourth of the same, besides the costs of this action.

(Signed) BILLINGS & HUGHES,
*Att'ys for Pet'ers.*

*Document "A."—Filed with petition.*

The Merchants' Mutual Insurance Company of New Orleans, by this policy of insurance, do make insurance and cause to be insured A. P. Lyman & D. E. Swinerton, on account of themselves, as sole owners of ¾ & ¼, respectively, of said brig, lost or not lost, in the sum of twelve thousand dollars, at and from the 1st November, 1869, to the 1st January, 1870, at noon, upon the body, tackle, apparel, and other furniture of the good brig called "Sailor Boy," whereof is master for this present voyage, , or whoever else shall go her master in the said vessel, or by whatever name or names the said vessel or the master thereof is or shall be named or called. Each passage subject to its own average. If on a passage, at the expiration of the term, with the liberty to renew for not exceeding three months, at the same rate of premium, if applied for on or before the end of the term, the risk to cease twenty-four hours after the arrival at her then port of destination and to return pro-rata premium for each month not commenced, no loss being claimed. Beginning the adventure

6 upon said vessel, tackle, apparel, &c., at and from as aforesaid, and so shall continue and endure until said vessel be safely arrived at as aforesaid, and until she be moored twenty-four hours in good safety. And it shall and may be lawful for the said vessel in her voyage to proceed and sail to, touch, and stay at any ports or places, if thereunto obliged by stress of weather or other unavoidable accident without prejudice to this insurance. The said vessel, tackle, &c., hereby insured, are valued at eighteen thousand dollars, without any further account to

Vessel.

No. 2779.

Sum insured 12,000 dollars.

be given by the assured to the assurers or any of them, for the same.

Valued at 18,000 dollars, including premium.

Touching the adventures and perils which the insurers are contented to bear and take upon themselves in this voyage, they are of the seas, jettisons, fire, enemies' men-of-war, pirates overpowering, (but not other thieves,) restraints and detainments of all kings, princes, or people of what nation or quality soever, barratry (except embezzlement or theft) of the master, (unless the insured be be an owner of the vessel,) and of marines, and all other losses to which the insurers are liable by this contract. And in case of any loss or misfortune resulting from any peril insured against, the party insured engages for his or their factors, servants, and assigns to sue, labor, travel for, and use all reasonable and proper means for the security, preservation, relief, and recovery of the property insured, or any
7 part thereof, to the charges whereof the said company engages to contribute in proportion as the sum insured bears to the whole sum at risk. And the acts of the insured or insurers or their agents in preserving, securing or saving the property insured, in case of danger or disaster, shall not be considered or held to be a waiver or acceptance of an abandonment, the company having been paid or promised to be paid, the consideration to this assurance by the assured or his or their assigns at and after the rate of three and one-half per cent.

Rate, 3½ per cent.

It is also agreed that the insurers shall not be answerable for any expense, damage, or loss which may arise in consequence of seizure or detention for or on account of any trade charged with being illicit or prohibited, or any trade in articles contraband of war, whether carried by the master, mariners, or any other persons, barratrously or otherwise, unless the insured shall show that the trade charged so to be was not illicit or prohibited. The insurers shall not be answerable for damages to other vessels or property in consequence of collision or running foul, nor for any general average or expenses on account of such damage. And it is also agreed, in case of capture, arrest, or restraint that the insured shall not abandon therefor until proof to the insurers of condemnation or the continuance of the capture, arrest, or restraint for at least ninety days. The insurers take no risk of embargo or blockade, but in case of the blockade of a port of destination, the vessel may proceed to another port not blockaded and wait for the blockade to be raised, or there end the passage; and in case of an em-
8 bargo or blockade in the port of departure, the vessel may wait there for the termination of the embargo or blockade; in each case the vessel shall continue, at the risk of the insurers while so waiting, for a reasonable time, not exceeding six months, at the end of which the insurance shall cease. The company shall not be liable for wages and provisions in case of capture, arrest, blockade, embargo, or restraint. And in case of a total loss with salvage the amount allowed out of the savings to the officers and crew for wages earned & services rendered previous to the loss shall be considered as so much of the salvage applied to the use of the owners, even although the same shall be allowed or paid under the name of salvage and not as wages, and shall accordingly be deducted in adjusting the loss. And it is further agreed that in case a total loss be claimed for or on account of any damage or charge to the said vessel, the only basis of ascertaining her value shall be her valuation in this policy. It is also agreed that, in case of loss or damage, the repairing and replacing of loss and damage shall only be estimated or charged against the insurers after excluding

Premium, $420.

Policy.

all losses or damages requiring to be repaired or replaced in consequence, in whole or in part, of wear and tear or natural decay. The proceeds of all the articles replaced at the charge of the insurers shall be deducted from the net loss after the usual allowance of new for old; and instead of deducting one-third from the cost of copper there shall be deducted two and one half per cent. of the net cost of recoppering, after deducting the value of the old copper and nails,
9 for each and every month the copper shall have been on the vessel, when the copper shall be replaced; and if the copper shall have been on forty months or more, the cost of recoppering shall be wholly excluded—the new copper to be of the same weight as the old. And it is also agreed that, if the said vessel upon a regular survey should be declared unseaworthy or incapable of prosecuting her voyage, and unsoundness or rottenness shall appear on the survey, or by other testimony, to be a principal cause thereof, then the assurers shall not be bound to pay any loss on this policy. And in case of stranding without the breaking up of the vessel, no abandonment shall be made until after thirty days from its occurrence and notice thereof to the insurers, nor unless the right to abandon shall then exist. In case of general average, if the vessel insured is valued in the statement thereof beyond the amount hereby insured, the insurers are to pay such part only of the sum assured as the amount insured bears to such valuation. And, in case of loss, such loss to be paid in sixty days after proof of loss and proof of interest in said vessel, (the amount of the note given for the premium, if unpaid, and all sums owing to this company by the said assured being first deducted.) No loss, except general average, shall in any case be paid, unless amounting to ten per cent. after deducting proceeds of savings, if any, and exclusive of all charges of ascertaining and proving the loss. And it is hereby further agreed that, if *if* the insured shall have made any other in-
10 surance against all or any of the risks hereby insured upon the vessel aforesaid prior to this policy, then the said insurance company shall be answerable only for so much as the amount of such prior insurance may be deficient towards covering the property at risk; and the said insurance company shall return the premium upon so much of the sum by them insured as they shall be exonerated from by such prior insurance. And, in case of any insurance upon said vessel subsequent to this policy, the said insurance company shall, nevertheless, be answerable to the full extent of the sum by them herein insured, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent insurance had been made. Policies made the same day are to be deemed simultaneous, but this company then assumes only its proportion of the loss to be made good by the insurers as the sum insured in this policy bears to the aggregate sum at risk. If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage. In all cases of return premium on short interest one-tenth part of the premium thereon is to be retained by the assurers. It is also agreed that this policy shall be void in case of its being assigned, transferred, or pledged without the previous consent in writing of the insurers.
11 And it is further agreed that said insurance company shall not be liable for any amount of losses during the continuance of this policy which, in the aggregate, shall exceed the 'mount insured.

Warranted by the assured not to carry lime.

Also warranted against any desertion, temporary or otherwise, of the vessel by master, officers, or marines, on the western coast of America, or in any of its bays, ports, or places, and against losses proceeding, directly or indirectly, from such desertion.

Warranted by the assured not to use port or ports in Eastern Mexico, Texas, nor Yucatan, nor anchorage thereof, during the continuance of this insurance, nor ports in West India Islands, between July 15th and October 15 nor ports on the northeast coast of Great Britain beyond the Thames, nor ports on the continent of Europe north of Antwerp, between November 1st and March 1st.

Warranted by 'he assured free from all claims for loss or damage arising from or growing out of the collision of foreign powers or of our Government with others.

Claims under this policy are payable in the common currency
12 existing at the time of payment, at sixty days from date of adjustment thereof.

Warranted by the assured, free from any claim for a constructive total loss, unless the sum for which the insurers would be liable under an adjustment of a particular average loss, made in conformity with the terms and conditions of this insurance, shall exceed fifty per cent. of the whole value of the vessels, as agreed upon this policy.

To navigate to or from all ports in the United States and West India Islands for the term of two months. (The grain, coal, lead, marble, iron, & guano clauses erased from the printed form of the policy by consent.) Insurance restricted to the sum herein insured. Loss, if any, payable to A. P. Lyman & D. E. Swinerton.

In witness whereof the said Merchants' Mutual Insurance Company have caused these presents to be signed by their president and attested by their secretary, at their office, in the city of New Orleans.

Attest.

New Orleans, 30th day of October, 1869.

(Signed) P. FOUCHY, *President.*

G. W. NOTT, *Secretary.*

[50 cts. Stamp. 50 cts.]

13 *Document "B."—Filed with the petition.*

The Merchants' Mutual Insurance Company of New Orleans, by this policy of insurance, do make insurance and cause to be insured A. P. Lyman & D. E. Swinerton, on account of themselves as sole owners of ¾ & ¼, respectively, of said brig, lost or not lost, in the sum of twelve thousand dollars, at and from the 1st January, 1870, to the 1st April, 1870, at noon, upon the body, tackle, apparel, and other furniture of the good brig called the Sailor Boy, whereof is master for this present voyage, or whoever else shall go for master in the said vessel, or by whatever name or names the said vessel, or the master thereof, is or shall be named or called. Each passage subject to its own average. If on a passage, at the expiration of the term with the liberty to renew for not exceeding three months, at the same rate of premium, if applied for on or before the end of the term. The risk to cease twenty-four hours after her arrival at her then port of destination, and to return pro-rata premium for each month not commenced—no loss being claimed. Beginning the adventure upon said
vessel, tackle, apparel, &c., at and from as aforesaid, and so
14 shall continue and endure until said vessel be safely arrived at

as aforesaid, and until she be moored twenty-four hours in good safety. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch, and stay at any ports or places if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance. The said vessel, tackle, &c., hereby insured, are valued at eighteen thousand dollars, without any further account to be given by the assured to the assurors, or any of them, for the same.

Touching the adventures and perils which the insurers are contented to bear and take upon themselves in this voyage, they are of the seas, jettisons, fire, enemies' men-of-war, pirates' overpowering (but not other thieves,) restraints, and detainments of all kings, princes, or people, or what nation or quality soever, barratry (except embezzlement or theft) of the master, (unless the insured be an owner of the vessel) and of marines, and all other losses to which the insurers are liable by this contract. And in case of any loss or misfortune resulting from any peril insured against, the party insured engages for his or their
15 factors, servants, and assigns, to sue, labor, travel for, and use all reasonable and proper means for the security, preservation, relief and recovery of the property insured or any part thereof, to the charges whereof the said company engages to contribute in proportion as the sum insured bears to the whole sum at risk. And the acts of the insured or insurers, or their agents, in preserving, securing, or saving the property insured, in case of danger or disaster, shall not be considered or held to be a waiver or acceptance of an abandonment, the company having been paid, or promised to be paid, the consideration to this assurance by the assured, or his or their assigns, at and after the rate of five per cent.

It is also agreed that the insurers shall not be answerable for any expense, damage, or loss, which may arise in consequence of seizure or detention for or on account of any trade charged with being illicit or prohibited, or any trade in articles contraband of war, whether carried on by the master, mariners, or any other person, barratrously or otherwise, unless the insured shall show that the trade charged so to be was not illicit or prohibited. The insurers shall not be answerable for damages to other vessels or property in consequence of collision or running foul, nor for any general average or expenses on account of
16 such damage. And it is also agreed, in case of capture, arrest, or restraint, that the insured shall not abandon therefor until proof to the insurers of condemnation, or the continuance of the capture, arrest, or restraint for at least ninety days. The insurers take no risk of embargo or blockade, but in case of the blockade of a port of destination, the vessel may proceed to another port, not blockaded, and wait for the blockade to be raised, or there end the passage; and in case of an embargo or blockade in the port of departure, the vessel may wait there for the termination of the embargo or blockade; in each case the vessel shall continue at the risk of the insurers while so waiting, for a reasonable time not exceeding six months, at the end of which this insurance shall cease. The company shall not be liable for wages and provisions in case of capture, arrest, blockade, embargo, or restraint. And in case of a total loss, with salvage, the amount allowed out of the savings to the officers and crew for wages earned and services rendered previous to the loss, shall be considered as so much of the salvage applied to the use of the owners, even although the same shall be allowed or paid under the name of salvage and not as wages, and shall accordingly be deducted in adjusting the loss.

17 And it is further agreed that, in case a total loss be claimed for or on account of any damage or charge to the said vessel, the only basis of ascertaining her value shall be her valuation in this policy. It is also agreed that, in case of loss or damage, the repairing and replacing of loss and damage shall only be estimated or charged against the insurers after excluding all losses or damages requiring to be repaired or replaced in consequence, in whole or in part, of wear and tear or natural decay. The proceeds of all articles replaced at the charge of the insurers shall be deducted from the nett loss, after the usual allowance of new for old, and, instead of deducting one-third from the cost of copper, there shall be deducted two and one-half per cent. of the net cost of recoppering, after deducting the value of the old copper and nails, for each and every month the copper shall have been on the vessel, when the copper shall be replaced; and if the copper shall have been on forty months or more, the cost of recoppering shall be wholly excluded—the new copper to be of the same weight as the old. And it is also agreed that if the said vessel, upon a regular survey, should be declared unseaworthy, or incapable of prosecuting her
18 voyage, and unsoundness or rottenness shall appear, on the survey or by other testimony, to be a principal cause thereof, then the assurers shall not be bound to pay any loss on this policy. And in case of stranding without the breaking up of the vessel, no abandonment shall be made until after thirty days from its occurrence, and notice thereof to the insurers, nor unless the right to abandon shall then exist.

In case of general average, if the vessel insured is valued in the statement thereof beyond the amount hereby insured, the insurers are to pay such part only of the sum assured as the amount insured bears to such valuation. And in case of loss, such loss to be paid in sixty days after proof of loss and proof of interest in said vessel, (the amount of the note given for the premium, if unpaid, and all sums owing to this company by the said assured being first deducted.) No loss except general average shall in any case be paid, unless amounting to ten per cent., after deducting proceeds of savings, if any, and exclusive of all charges of ascertaining and proving the loss.

And it is hereby further agreed that if the insured shall have made any other insurance against all or any of the risks hereby insured
19 upon the vessel aforesaid prior to this policy, then the said insurance company shall be answerable only for so much as the amount of such prior insurance may be deficient towards covering the property at risk; and the said insurance company shall return the premium upon so much of the sum by them insured as they shall be exonerated from by such prior insurance. And in case of any insurance upon said vessel subsequent to this policy, the said insurance company shall, nevertheless, be answerable to the full extent of the sum by them herein insured, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made. Policies made the same day are to be deemed simultaneous; but this company then assumes only its proportion of the loss to be made good by the insurers, as the sum insured in this policy bears to the aggregate sum at risk. If the voyage aforesaid shall have been begun, and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage. In all cases of

Vessel.
No. 2799.
Sum insured, 12,000 dollars.
Valued at 18,000 dollars, including premium.
Rate, 5 per cent.
Premium, $600
Policy, "
$600

return premium, on short interest, one-tenth part of the premium thereon is to be retained by the assurers.

20 It is also agreed that this policy shall be void in case of its being assigned, transferred, or pledged without the previous consent in writing of the insurers.

And it is further agreed that said insurance company shall not be liable for any amount of losses during the continuance of this policy, which, in the aggregate, shall exceed the amount insured.

Warranted by the assured not to carry lime. Also warranted against any desertion, temporary or otherwise, of the vessel by master, officers, or marines, on the western coast of America, or in any of its bays, ports, or places, and against losses proceeding, directly or indirectly, from such desertion. Warranted by the assured not to use port or ports in Eastern Mexico, Texas, nor Yucatan, nor anchorage thereof, during the continuance of this insurance, nor ports in West India islands, between July 15th and October 15th, nor ports on the northeast coast of Great Britain beyond the Thames, nor ports on the continent of Europe north of Antwerp, between Nov'r 1st & March 1st. Warranted by 'he assured free from all claims for loss or damage arising from or growing out of the collision of foreign powers, or of our Government with others.

[50 cts. Stamp. 50 cts.]

21 Claims under this policy are payable in the common currency existing at the time of payment, at sixty days from date of adjustment thereof.

Warranted by the assured free from any claim for a constructive total loss, unless the sum for which the insurers would be liable, under an adjustment of a particular average loss, made in conformity with the terms and conditions of this insurance, shall exceed fifty per cent. of the whole value of the vessel, as agreed upon this policy.

To navigate to or from all ports in the United States and West India Islands for the term of three months, (the grain, coal, lead, marble, iron, & guano clauses erased from the printed form of the policy by consent.) Insurance restricted to the sum herein insured. Loss, if any, payable to A. P. Lyman & D. E. Swinerton.

In witness whereof the said Merchants' Mutual Insurance Company have caused these presents to be signed by their president and attested by their secretary, at their office in the city of New Orleans.

New Orleans, 15th day of January, 1870.

Attest:

(Signed) P. FOUCHY,
*President.*

(Signed) G. W. NOTT, *Secretary.*

22 *Citation.*

The President of the United States of America to the marshal of the district of Louisiana, greeting:

A. P. LYMAN AND DAVID SWINERTON
*vs.*
THE MERCHANTS' MUTUAL INSURANCE CO. of New Orleans. } No. 6125.

You are hereby commanded to summon The Merchants' Mutual Insu-

rance Company of New Orleans, a citizen of the State of Louisiana, to comply with the demand of A. P. Lyman and David Swinerton, citizens of the State of Wisconsin, contained in the petition of which a copy accompanies this citation, or to deliver its answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, or judgment will be rendered against it by default: which delay is increased one day for every ten miles the defendants' residence is distant from New Orleans, the place where the court is held; and that you make due return hereof on the first Monday of April, 1870.

23 Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 3rd day of March, A. D. one thousand eight hundred and seventy, and of the independence of the United States of America the 94th year.

[SEAL.] (Signed) D. URBAN, *Clerk*,
By F. B. VINOT, *D'y Clerk*.

*Marshal's return.*

Received, March 3d, 1870, by the U. S. marshal, and on the 4th day of the same month and year served a copy of the within citation and accompanying petition on The Merchants' Mutual Insurance Company of New Orleans, through Paul Fourchy, its president, by delivering the same to him, said president, in person.

New Orleans, March 4th, 1870.

(Signed) S. W. REED,
*D'y U. S. Marshal.*

*Answer.—Filed March 12th*, 1870.

A. P. LYMAN & AL.
*vs.*
MERCHANTS' M. INS. CO. } No. 6125.

24 The defendants deny all the allegations of the petition, and specially aver—

That on the day of October, 1869, plaintiffs obtained from defendants a policy of insurance on said vessel for the space of two months, expiring on the 1st day of January, 1870; that said policy was not renewed before its expiration; but that, subsequently, on the 15th January, 1870, the plaintiffs, through their agents, Higby & Son, effected insurance on said vessel for the sum of $12,000, for three months, at the rate of 5 % premium, and *and* received a new policy, bearing the date of said application.

That in the mean time, between the date of expiration of the first policy and the application for the second policy, said vessel had been abandoned at sea; and the plaintiffs, with full and entire knowledge of said abandonment, fraudulently applied for and obtained said second policy of insurance from the defendants, from whom said abandonment had been purposely concealed, and who were ignorant of said fact; that said policy of insurance is, therefore, null and void.

That no notice of loss or preliminary proof has been made within reasonable time, so as to enable defendants to take proper steps to protect themselves from loss in the premises; and that respondents are informed

and verily believe that said vessel was generally unseaworthy, and more particularly in being overladen, thereby vitiating warranties contained in the policy of insurance.

Wherefore respondents pray to be dismissed with costs.

(Signed) ALBERT VOORHIES, *Att'y.*

*Protest.—Filed March 23d*, 1870.

[25ct. revenue stamp.]

UNITED STATES OF AMERICA,
*State of New York, City of New York, ss:*

[SEAL.] To all people to whom these presents shall come or may concern:

I, Henry Moss, a notary public in and for the State of New York, by letters-patent, under the great seal of said State, duly commissioned and sworn, dwelling in the city of New York, send greeting:

Know ye, that on the thirteenth day of January, in the year of our Lord one thousand eight hundred and seventy, before me personally appeared D. E. Swinerton, of the brig called the Sailor Boy, of *Shellbygan, Miss.*, and noted in due form of law with me, the said notary, this protest for the uses and purposes hereafter mentioned, and now at this day, to wit, the day, of the date hereof, before me, the said notary, at the city of New York aforesaid, again comes the said D. E. Swenerton. and requires me to extend his protest, and, together with the said D. E. Swenerton, also came Geo. H. Briggs, Arthur Rogerson, William Tazler, and James Morris, belonging to the aforesaid brig Sailor Boy, all of whom being by me duly sworn on the Holy Evangelists of Almighty God, voluntarily, freely, and solemnly, do declare and depose as follows, that is to say: That he, the said D. E. Swenerton set sail and departed in and with the said brig Sailor Boy, as master thereof, from New York, having on board the said brig a cargo of general merchandise, and bound for the port of New Orleans, La.; that the said brig Sailor Boy was then stout, staunch, and strong; had her cargo well and sufficiently stowed and secured; was well masted, manned, tackled, victualed, appareled, and appointed, and was in every respect fit for sea, and the voyage she was about to undertake.

26

27 That the day of their departure from New York was Wednesday, December 29th, 1869. Day commenced with light breeze from N. W. and cloudy weather. At 5 a. m. got under weigh and proceeded out of port. At 8 a. m. discharged pilot. At 9 a. m. "light-ship" bore east 4 miles. So ends the day. Pumps attended to. Nothing of moment occurred until—

SUNDAY, *Jan'ry 2d*, 1870.—Day commenced, blowing a gale from S. to S. S. W., and a tremendous heavy sea running; vessel constantly shipping deck-loads of water, and labouring heavily. At 6 p. m. parted fore-topmast back-stay; vessel rolling and labouring heavily. At 7, close-reefed the mainsail, hauled the lower fore-topsail, and brought the brig too under clouse-reefed mainsail and main storm-staysails. So ends the day. Pumps attended to.

MONDAY, *Jan'ry 3rd*, 1870.—Day commenced with a most violent gale from south, with a high cross-sea; vessel rolling and labouring heavily, shipping deck full of water; shifted deck-load; carried away f.-top & top-gallant back-stay and all lanyards to fore-rigging and schrouds. Vessel commenced to leak badly. Day ends the same. Pumps constantly attended to.

TUESDAY, *Jan'ry* 4, 1870.—Day commenced with a continuation of the gale of the preceeding days, with a very heavy sea on; vessel
28 under balanced reefed mainsail, close-reefed f.-top-sail, main-staysail, f.-topmast-staysail; vessel rolling and labouring heavily; carried away all back-stays and lanyards to fore-rigging; masts swaying so could not get aloft to secure them and other rigging. At 5 a. m. a very heavy squall, carried away for'mast and tackle, & with it fell the mainmast and jib-booms, leaving the vessel a complete wreck; had to cut away all the spars and rigging for fear of damaging the hull; vessel making much water. So ends the day. Crew constantly at the pumps.

WEDNESDAY, *Jan'ry* 5, 1870.—Day commenced with stiff breeze from W. N. W.; heavy sea running; vessel rolling; sails under; filling decks full of water; found it necessary to lighten vessel; threw overboard about 30 tons railroad iron. Middle and latter part strong gales and squally; wind W. N. W.; vessel laying broadside on; no head-sail to get her off; crew employed in trying to rig jury-mast with the only remaining spar, the main-boom; vessel still leaking badly. So ends the day. Pumps constantly attended to.

THURSDAY, *Jan'ry* 6, 1870.—Day commenced blowing a gale from W. N. W., with very heavy sea; got up the spar about twenty feet
29 in length, bent a staysail and gaff-topsail to get the brig before the wind; succeeded to pay her off about 3 p. m.; sea making a complete breach over the vessel fore and aft; all hands employed in making preparations to get all possible sail set, and pumping to get the vessel to some port. So ends the day. Pumps constantly attended to.

FRIDAY, *January* 7, 1870.—Day commenced with strong winds from W. N. W., with squalls; steering S. E.-by-E., making about one mile per hour, under all sail; all hands employed at the pumps; a sail in sight, heading N. W. Heavy weather continued throughout this day; vessel rolling and laboring heavily. Day ends the same. Pumps constantly attended to.

SATURDAY, *January* 8, 1870.—Day commenced with strong winds and squalls from W. S. W. Set our signal in distress, when the vessel, (which proved to be the brig Harriet Queen, of Bermuda,) changed her course to meet us. At 2 o'clock, she was within hailing distance; hailed her, and found she was bound to New York. Captain sent his boat alongside. On consultation, I found we could not get any spars or water, vessel being in a disabled condition; spars gone, sails carried away; vessel having three feet of water in the hold and leaking badly;
30 crew exhausted and completely worn out by excessive hard work. Concluded for the benefit of all concerned, and possibly to save life, to abandon vessel to her fate, which we did; and after considerable difficulty was transferred to brig Harriet Queen, and arrived at New York, Thursday, January 13th, 1870. And so ends our perelious voyage.

And the said D. E. Swinerton further says that, as all the damage and injury which already has or may hereafter appear to have happened or accrued to the said brig or her said cargo has been occasioned solely by the circumstances hereinbefore stated, and cannot nor ought not to be attributed to any insufficiency of the said brig, or default of him, this deponent, his officers, or crew, he now requires me, the said notary, to make his protest and this public act thereof, that the same may serve and be of full force and value as of right shall appertain.

And thereupon the said D. E. Swinerton doth protest, and I, the said notary, at his special instance and request, do by these presents publicly and solemnly protest against winds, weather, and seas, and against all and every accident, matter, and thing had and met with as aforesaid,

whereby or by means whereof the said br. or her cargo already
31 has or hereafter shall appear to have suffered or sustained damage or injury for all losses, costs, charges, expenses, damages, and injury which the said br., the owner or owners of the said br., or the owners, freighters, or shippers of her said cargo, or any other person or persons interested or concerned in either, already have or may hereafter pay, sustain, incur, or be put unto, by or on account of the premises, or for which the insurer or insurers of the said br. or her cargo is or are respectively liable to pay or make contribution or average, according to custom, or their respective contracts or obligations; and that no part of such losses and expenses already incurred or hereafter to be incurred do fall on him, the said D. E. Swinerton, his officers, and crew.

Thus done and protested in the city of New York, this fourteenth day of January, in the year of our Lord one thousand eight hundred and seventy.

In testimony whereof as well the said appearers, as I, the notary, have subscribed these presents, and I have also caused my seal of office to be hereunto affixed the day and year last above written.

(Signed) HENRY MOSS,
*Not. Pub., New York.*

32 (Signed) MASTER D. E. SWINERTON.
1ST MATE GEO. H. BRIGGS.
2D MATE ARTHUR ROGERSON.
SEAMEN WILLIAM TAYLOR.
" JAMES MORRIS.

CITY AND COUNTY OF NEW YORK, *ss:*

I, Henry Moss, a public notary in and for said city and county, duly commissioned and sworn, dwelling in said city, do certify the foregoing to be a true and exact copy of an original protest on record in my office.

In testimony whereof I have hereunto set my hand and notarial seal this fourteenth day of January, one thousand eight hundred and seventy.

[SEAL.] (Signed) HENRY MOSS,
*Notary Public, New York.*

[5-cent re. st'm.]

*Rule.*

NEW ORLEANS, *Thursday, Jan'ry* 26, 1871.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, judge.

33 A. P. LYMAN & AL.
*vs.*
MERCHANTS' MUTUAL INSURANCE COMPANY. } No. 6125.

On motion of Billings and Hughes, attorneys for pl'ffs herein—

Ordered, that defendant show cause, on Wednesday, 1st day of Feb'ry, 1871, at 11 a. m., why the testimony of A. P. Lyman, David Swinerton, and I. B. Gwynne, taken under commission issued by this court for the plaintiff herein, should not be read in evidence upon the trial of this cause.

*Rule absolute.*

NEW ORLEANS, *Wednesday, Feb'ry 1st*, 1871.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, judge.

A. P. LYMAN & AL.
*vs.*
MERCHANTS' MUTUAL INSURANCE COMPANY of New Orleans. } No. 6125.

The rule taken on 26th ult'o was called;
Billings & Hughes for pl'ffs;
A. Voorhies, for def't, not present—
When it is ordered that the rule be made absolute, and said
34 depositions read in evidence on the trial of the cause.

*Note of evidence.—Filed February* 3, 1871.

A. P. LYMAN & AL.
*vs.*
MERCHANTS' MUTUAL INSURANCE COMPANY of New Orleans. } No. 6125.

Plaintiffs offered in evidence the depositions marked A, B, & C, and document attached.
Objected to by defendant.
L. J. Higby sworn for pl'ffs.
Pl'ffs offered letter D.
Def't offered application for insurance E.
Paul Fourchy, president Merchants' Insurance Company, sworn for def'ts; also, G. W. Nott, secretary of same company; also, M. D. Gardner, clerk telegraph office.
Def't offered telegram F.
L. J. Higby recalled for pl'ffs.

35 *Judg't from minutes.*

NEW ORLEANS, *Friday, February 3d*, 1871.

Court met pursuant to adjournment.
Present, Hon. E. H. Durell, district judge.

A. P. LYMAN & AL.
*vs.*
MERCHANTS' MUTUAL INSURANCE COMPANY. } No. 6125.

By reason of the verdict herein, and in accordance therewith, it is ordered, adjudged, and decreed that the plaintiffs do have and recover from the def't, The Merchants' Mutual Insurance Company of New Orleans, the sum of twelve thousand dollars, with 5 % interest from 3d March, 1870, till paid, and costs of suit; the petitioner A. P. Lyman, being entitled to ¾ths and the petitioner D. Swinerton, to ¼th of said judgment.

*Bill of exceptions.—Filed February 3rd*, 1871.

A. LYMAN & AL.
*vs.*
MERCHANTS' MUTUAL INSURANCE COMPANY. }

Be it remembered that, on the trial of this case, the plaintiffs
36 offered the deposition and testimony of a witness,

whose testimony, taken by commission, is annexed to this bill of exceptions for reference, and that the defendants objected to all that part of the deposition and testimony tending to show a previous verbal contract of insurance between plaintiffs and defendants' company; that the defendants' counsel based their objection on the grounds that there was a written contract of insurance between the parties for the same amount of insurance, for the same amount of premium, on the same object insured, the vessel called Sailor Boy, by the same plaintiffs as insured, and defendants as insurers, for the same space of time, to wit, from the 1st day of January, 1871, to the 31st March, 1871; that the plaintiffs had no right to contradict *his* written application aforesaid by proof of a previous verbal contract; that the plaintiffs' right of action, if any, was on the written application and contract aforesaid, and that they could not ignore the said written contract to fall back on an alleged previous verbal contract of the same tenor and purport; that the evidence showing that, when said written contract was executed, the
37 plaintiffs and their agents were aware of the fact of the previous loss and abandonment of the Sailor Boy, said written application and policy were not binding in law, but were nevertheless the contract of the parties subject to be gainsaid by proper allegations and proof of fraud; that plaintiffs could not ignore the written contract.

But the court ruled as follows: the plaintiffs put their entire case upon a verbal contract to renew the insurance made, as they allege, on the 31st day of December, eight days before the loss. They admit that when they sent for the written policy on the 15th of January, they knew of the loss, and that they could not recover on the written policy standing by itself, but they say that the real contract was made on the 31st of December, and that they had a right to go to the jury on that issue, and overruled the objection and admitted the testimony.

To this ruling of the court the defendants objected, and reserved this their bill of exceptions, duly signed in open court, the 3rd day of February, A. D. 1871.

(Signed) E. H. DURELL, *Judge.*

38 *Deposition and testimony of Joel B. Gwynne, taken by commission and annexed to bill of exceptions.—Offered by pl'ffs and filed Feb'ry 3rd*, 1871.

In the circuit court of the United States, district of Louisiana.

A. P. LYMAN AND DAVID SWINERTON
*vs.*
THE MERCHANTS' MUTUAL INSURANCE COMPANY. } No. 6125.

Before Ephraim Marriner.

The deposition of Joel B. Gwynne on behalf of the plaintiffs in the above-entitled action, taken before me at my office, No. 110 Wisconsin street, (in the library building,) in the city of Milwaukee, in the State and eastern district of Wisconsin, pursuant to the commission, and on the interrogatories and cross-interrogatories hereto annexed.

The said J. B. GWYNNE, having been first duly sworn, testified as follows:

To the first interrogatory as follows:

Q. What is your name, age, occupation, and place of residence?

He answered:

39 A. My name is Joel B. Gwynne. My age is twenty-eight years. I am not now in any business, but my occupation has ordinarily been insurance business for the past three or four years.

2. Int. During the latter part of the year 1869, and the early part of the year 1870, were you in the city of New Orleans? If so, in whose employ? Where was your office? Did you take any steps for insuring or renewing the insurance of the brig "Sailor Boy?" If yea, for whom, when, and state in detail all the circumstances relating thereto? State in whose behalf and at whose request such re-insurance was effected. If you had any interview with the defendants on the subject, state when, where, and all that transpired at their office. If you say you had an interview on the 31st day of December, 1869, on that subject, state with whom and where. If you say that it was with any person at the office of the Merchants' Mutual Insurance Co., annex a diagram showing where such party stood, and state what he was doing. If you say that the policy on the brig Sailor Boy, which expired on the

40 31st December, was renewed, state particularly all that transpired with reference to the renewal.

Ans. I was in the city of New Orleans during the latter part of the year 1869 and the early part of the year 1870. I was in the employ of Cook & Welshan, of New Orleans, as an insurance broker or solicitor, and I was employed by L. J. Higby & Son, to do odd jobs for them. I wrote up their books and helped them to collect their bills, and such things. I had no regular office. Was, a part of the time, at Messrs. Higby's office, No. 122 Common street, and part of the time at Cook & Welshan's office, 46 Camp street. I did take steps for renewing the insurance or re-insuring the brig "Sailor Boy," by the direction of Mr. L. J. Higby, in behalf of the owners of the brig. I had an interview with the secretary of the defendants, at its office, in the city of New Orleans. Captain Swinerton, one of the plaintiffs, had written Mr. Higby, from New York, to have the brig re-insured. Mr. Higby, about the 15th of December, and I think on that day, gave me the captain's letter, and told me to go to the office of the defendants and see if they would renew the policy and get the rate. I took the letter

41 and went to the defendants' office, and told a gentleman standing at the angle of the desk my business. He referred me to the secretary of the company. I showed him the letter, and told him I wanted the policy renewed for three months, and wanted the rate at which he would do it. The secretary read the letter, and said that they would renew the policy, but he could not give me the rate then, that he would send over to the office and let us know the rate, (I mean the office of L. J. Higby & Son.) Then I came away and brought the letter with me. I went back and told Mr. Higby what I had done. I had nothing more to do with the matter till December 31st, though I heard that the rate of insurance had been sent to Mr. Higby's office, and that it was five per cent., and was satisfactory to Mr. Higby; but I heard this from Mr. Higby, and not from the defendants. On the thirty-first of December Mr. Higby told me to go and renew the policy. I went to the defendants' office on the 31st December, about half past three in the afternoon, and asked to have the policy renewed. A clerk, or person standing at the desk, to whom I applied, told

42 me that the secretary had gone home, and that there was no one in the office who could do it, but said he would speak to the secretary when he came in, in the morning, and have it attended to the first thing. I told him to send the policy to Mr. Higby's office, and gave

him the number of the office, told him it was up stairs, over the Louisiana National Bank. I then went back and told Mr. Higby what I had done. I did nothing more the matter for some days—ten or fifteen days—afterwards. Mr. Higby asked me if the policy had been sent in. I told him it had not. He told me to go around and get it. I went around and went to the office of the defendants and asked the man at the corner of the desk for the policy on the Sailor Boy. He turned over his book, but could not find it. Said he would go and see the secretary. He went into the back office and returned with the secretary. The secretary said that he did not know that a policy had been ordered. I told him that I had ordered it the 31st of December. He said there had been no application made out. I told him I did not know
43 anything about that; that no one said anything about an application to me. He said there should be one, and told the clerk to make out one for me to sign. Clerk made it out and I signed it and paid the insurance, that is the premium, by check of L. J. Higby & Son for $510.00. The secretary asked me if anything had been heard from the vessel. I said not that I knew of. I told them to send the policy around to the office, and went away. They did not send the policy, as they promised, and the next day Mr. Higby sent an office boy around, and he brought it to the office. The secretary promised, when I paid the money, to make the policy out and send it around at once. I have made a plan of the office as I remember it, and it is annexed, marked Exhibit No. 1; and the desk "A," which stands upon a counter, is the place at which I made all my inquiries, when I went to the office of the defendant about this re-insurance, including the request to re-insure, Decem. 31st, 1869.

Last interrogatory. Do you know of any other matter or thing which would make for the benefit of plaintiffs herein? If yea, state
44 the same as fully and in detail as if specially interrogated in relation thereto.

Answer. I do not. I have detailed everything I had to do with such re-insurance as fully as I can recollect.

First cross-interrogatory. Previous to your making written application for the policy on the brig Sailor Boy, dated Jan'ry 15, 1870, and after you had represented that you had previously made verbal application for a policy on said brig to one of the employees of the defendant, were you not called upon by the president of the Merchants' Mutual Insurance Company, and Mr. Higby, or by either of them, to repair to the office of said company, and there to identify the employee or person to whom you have made such application? Did you accordingly repair to the office of the defendants? Did you examine all the clerks, employees, and other persons in said office? Did you or not recognize and identify any of them as the person to whom you had made such application?

Answer. To the first cross-interrogatory he says: I was not so requested, previous to making the application dated the 15th January, 1870, by any one, but I was so requested by a gentleman, whose
45 name I do not know, but whom I believed to have been the president of the company, after the policy was made out and delivered, and the loss was made known to the defendant, and payment of the loss had been demanded, and I did go to the office of the defendant and saw the clerks and employees and persons then present, and examined such as I saw; but whether all of the employees of the office were present, I cannot state, nor can I state whether I saw all of the persons in the office at the time, but I did, as I think, unless they were

concealed, or avoided me, and I was not able to recognize or identify either of them as the person to whom I had made the application. I could identify faces which I had seen there before, but whether I had seen them the first or second time, I could not be positive. I recognized the secretary, and the person I suppose to have been the president, and one other person as persons I had seen there before, but I could not be positive of any others, nor could I swear that the persons I saw, other than the president and secretary, and whom I could identify, was the person to whom I made the application. I was a stranger in New
46 Orleans, having come there about the first of November, 1869, and I had only been in the defendants' office at the times hereinbefore stated. If I had been at the office but once I think I could have identified the person to whom I made the application, but I might not have been able to have done it, as I saw so many new things and new faces, and so much time had elapsed, and the interviews was very brief, as the company had before insured the brig, and had the facts, and knew about her, and I did not know anything about it further than to ask the renewal.

2d cross-interrogatory. Who signed the written application for the policy dated January 15th, 1870? On what day, and by whom was said application delivered to the defendants?

Answer to 2nd cross-interrogatory. I signed the application, that is, I did the writing. I signed it on the 15th day of January, 1870, at the time I paid the check for the premium on the policy, and delivered it to the defendants, that is to say, the secretary told me that an application in writing was necessary, and directed the clerk to make out
47 one. The clerk thereupon filled out a blank application, copying from some paper, and, as I supposed, from the application, upon which the first policy was based, and handed it to me to sign. I signed it, supposing it to be a copy of the original application, without reading it, and without noticing the date of it, and they took it, and I paid the premium, and they promised to send the policy around to the office, as soon as it was made out. I told them I wanted the policy to run from the expiration of the old policy, and they agreed so to make it.

(Signed) JOEL B. GWYNNE.

Subscribed & sworn before me this 19th of August, 1870.

(Signed) E. MARINER,
*Commissioner, &c.*

*Rule and grounds.—Filed Febr'y* 7, 1871.

Circuit court of the United States, fifth circuit and district of Louisiana, November term, A. D. 1870.

NEW ORLEANS, *Tuesday, 7th day of Febr'y*, 1871.

48 Court met, pursuant to adjournment.

Present, the Honorable W. B. Woods, presiding judge; the Honorable E. H. Durell, district judge.

A. P. LYMAN & ALS.
*vs.*
MERCHANTS' MUTUAL INSURANCE CO. } No. 6125.

On motion of A. Voorhies, attorney for the defendants, it is ordered

that plaintiffs show cause on the 13th instant, at 11 a. m., why the verdict herein should not be set aside, and a new trial awarded on the grounds filed. That the evidence shows that no verbal or other contract of insurance was made between the parties, except the one evidenced by a written application on file, dated 15th January, 1871; that, on the day previous, the plaintiffs, being aware of the destruction and abandonment of the vessel, concealed the fact from defendants, and obtained a policy, taking effect from the 1st of January, 1871; that said policy is null and void; and that the attempt to prove a previous verbal
49 contract is in conflict with the said written application; and proof of said verbal contract was wholly inadmis'ible; that the loose and contradicted evidence of such previous verbal contract is not entitled to any legal weight the moment that said written application is produced.

*Marshal's return of service of rule.*

Received, Febr'y 8th, 1871, by the U. S. marshal, and on the 9th day of same month and year, served copy of within rule on Messrs. Billings & Hughes, by leaving same in the hands of J. Follette, at their office, 82 Custom-house street, N. O.

New Orleans, La., Febr'y 8th, 1871.

(Signed) S. W. REED,
*D'y U. S. Marshal.*

*Submission of rule.*

NEW ORLEANS, *Saturday, February* 18, 1871.

Court met pursuant to adjournment.
Present, Hon. W. B. Woods, presiding judge.
" " E. H. Durell, district judge.

A. P. LYMAN & AL.
*vs.*
MERCHANTS' MUTUAL INSURANCE COMPANY. } No. 6125.

50 The rule taken by defendants for a new trial was called—A. Voorhies, for plaintiff in rule; Billings & Hughes, for def'ts in rule—and after hearing argument the court took time to advise.

*Order.—New trial refused.*

NEW ORLEANS, *Saturday, April* 22, 1871.

Court met pursuant to adjournment.
Present, Hon. E. H. Durell, district judge.

A. P. LYMAN & AL.
*vs.*
MERCHANTS' MUTUAL INSURANCE COMPANY. } No. 6125.

For the reasons orally assigned by the court, it is ordered that the rule taken by the defendant, on the 7th February, 1871, be discharged, and that a new trial be refused, with costs.

*Judgment.*

United States circuit court, fifth circuit and district of Louisiana, November term, 1870.

NEW ORLEANS, *Friday, February 3rd*, 1871.

Court met pursuant to adjournment.
Present, Hon. E. H. Durell, district judge.

A. P. LYMAN & AL.
*vs.*
MERCHANTS' MUTUAL INSURANCE COMPANY. } No. 6125.

51 By reason of the verdict herein, and in accordance therewith, it is ordered, adjudged, and decreed that the plaintiffs do have and recover from the defendant, the Merchants' Mutual Insurance Company of New Orleans, the sum of twelve thousand dollars, with 5% interest from 3rd March, 1870, till paid, and costs of suit—the petitioner A. P. Lyman being entitled to ¾ths, and the petitioner D. Swinerton to ¼th of said udgment.

Judgment rendered February 3, 1871.
Judgment signed April 24, 1871.
(Signed) E. H. DURELL, *Judge.*

*Rule—26th April*, 1871.

Circuit court of the United States, fifth circuit and district of Louisiana, April term, A. D. 1871.

NEW ORLEANS, *Wednesday, 26th day of April*, 1871.

Court met pursuant to adjournment.
Present, the Honorable E. H. Durell, dist. judge; the Honorable , judge.

LYMAN & ALS.
*vs.*
MERCHANTS' MUTUAL INSURANCE COMPANY. } No. 6125.

52 On motion of defendant, through their counsel, A. Voorhies, it is ordered that plaintiffs show cause on 28th instant, at 11 a. m., why the annexed bill of exception should not be signed by the hon. the judge presiding.

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.
Witness my hand and seal of said court, at the city of New Orleans, this 26th day of April, 1871.
(Signed) F. B. VINOT, *D'y Clerk.*

*Marshal's return of service of rule.*

Received, April 27th, 1871, by the U. S. marshal, and on the 27th April,

1871, served a copy hereof on Billings & Hughes by handing same to J. L. Follette, their clerk, at office, 82 Custom-house street, in this city.

(Signed) S. W. REED,
*D'y Marshal.*

APRIL 28TH, '71.

*Order.—Rule dismissed.*

NEW ORLEANS, *Thursday, April 27th*, 1871.

Court met pursuant to adjournment.
Present, Hon. E. H. Durell, district judge.

53 A. P. LYMAN & AL.
*vs.*
MERCHANTS' MUTUAL INSURANCE COMPANY OF New Orleans. } No. 6125.

The rule taken on 16th instant was called—A Voorhies, for pl'ffs in rule; E. C. Billings, for def'ts in rule—and, after hearing counsel, ordered that the rule be dismissed with costs.

*Petition and order for writ of error.—Filed April 29th*, 1871.

United States circuit court, 5th district of Louisiana.

A. P. LYMAN & AL.
*vs.*
MERCHANTS' MUTUAL INSURANCE COMPANY. } No. 6125.

To the h'ble the circuit court of the United States for the fifth circuit, district of Louisiana:

The Merchants' Mutual Insurance Company of New Orleans, defendant in the above-entitled suit of Lyman & al. against them, respectfully represent:

That there was error in the judgment rendered against them
54 on the 3d day of February, 1871, signed on the 24th day of April, 1871, which will work them irreparable injury unless he can be relieved therefrom by a writ of error.

Wherefore they pray that the annexed bond being considered, they may be allowed a writ of error, returnable to the Supreme Court of the United States, according to law, and that the same shall operate as a supersedeas of all further proceedings against him in this court, until the cause be disposed of by the United States Supreme Court. Pray for general relief, and, as in duty bound, etc.

(Signed) ALBERT VOORHIES,
*Att'y for Def'ts.*

*Order.*

A writ of error is allowed in this case as prayed for, returnable to the Supreme Court of the United States on the first Monday of December next, the petitioners giving bond in the sum of eighteen thousand dollars, with good and solvent security, conditioned as the law directs.

April 29th, 1871.

(Signed) E. H. DURELL, *Judge.*

55 *Bond for writ of error.—Filed April 29th, 1871.*

Know all men by these presents that we, Paul Fourchy, president of the Merchants' Mu'l Ins. Co., as principal, and P. Maspero and D. A. Chaffraix, as sureties, are held and firmly bound unto Asahel P. Lyman, and David Swinerton, in the full and just sum of eighteen thousand dollars, to be paid to the said Asahel P. Lyman and David Swinerton, their certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this 29th day of April, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein Asahel P. Lyman and David Swinerton are plaintiffs, and Merchants' Mu. In. Co., defendant, judgment was rendered against the said Merchants' M'l Ins. Co., defendant, and the said Merchants' Mu'l Ins. Co., having obtained a writ of
56 error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Asahel P. Lyman and David Swinerton, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Merchants' Mutual Insurance Co. shall prosecute their writ to effect, and answer all damages and costs if they fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

| | | |
|---|---|---|
| (Signed) | P. FOURCHY, *Pr's't.* | [L. S.] |
| ( " ) | P. MASPERO. | [L. S.] |
| ( " ) | D. A. CHAFFRAIX. | [L. S.] |

Sealed and delivered in the presence of—
Witnesses:
(Signed) G. W. NOTT.
( " ) S. L. RELF.

57 UNITED STATES OF AMERICA,
*Circuit Court of the United States,*
*Fifth Circuit and District of Louisiana:*

CLERK'S OFFICE.

I, Dominick Urban, clerk of the circuit court of the United States, for fifth circuit and district of Louisiana, do hereby certify that the foregoing 56 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of Asahel P. Lyman and David Swinerton vs. The Merchants' Mutual Insurance Co. of N. O., No. 6125 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 1 day of June, A. D. 1871.

[SEAL.] D. URBAN, *Clerk.*

[5-ct. int. rev. stamp, cancelled.]

I, E. H. Durell, United States judge for the district of Louisiana, do

hereby certify that Dominick Urban, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 1 day of June, A. D. 1871.

E. H. DURELL, *Judge.*

[5-ct. int. rev. stamp, cancelled.]

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or one of you, between Asahel P. Lyman and David Swinerton and The Merchants' Mutual Insurance Company of New Orleans, a manifest error hath happened, to the great damage of the said Merchants' Mutual Insurance Company of New Orleans, as by their complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 29th day of April, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] D. URBAN,
*Clerk of the United States Circuit Court*
*for the District of Louisiana.*

(Indorsed:) United States circuit court. No. 6125. The Merchants' Mut. Ins. Co. of New Orleans, pl'ffs in error, versus Asahel P. Lyman & David Swinerton. Writ of error. Filed April 29th, 1871. F. B. Vinot, d'y cl'k.

59 THE UNITED STATES OF AMERICA,
*District of Louisiana:*

The President of the United States to David Swinerton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a petition & a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein The Merchants' Mutual Insurance Company of New Orleans are plaintiffs in error, and you are defendant, to show cause, if any there be, why the judgment

rendered against the said plaintiffs, as in said petition & writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this second day of May, in the year of our Lord one thousand eight hundred and seventy-one.

E. H. DURELL, *Judge.*

60 (Indorsed:)

David Swinerton. United States circuit court. No. 6125. The Merchants' Mutual Ins. Co. of New Orleans, pl'ffs in error, vs. Asahel P. Lyman and David Swinerton. Citation.

*Marshal's return.*

Received, May 2, 1871, by the U. S. marshal, and on the 4th day, same month and year, served a copy of the within citation in error on the within-named David Swinerton by delivering the same to E. C. Billings, his attorney, in person, at No. 82 Custom-house street, in this city.

New Orleans, May 4, 1871.

S. W. REED,
*D'y U. S. Marshal.*

On this 4th day of May, 1871, personally appeared before me, the subscriber, S. W. Reed, and makes oath that *a* delivered a copy of the within citation as stated in his official return hereon.

S. W. REED.

Sworn to and subscribed before me.

F. B. VINOT, *D'y Cl'k.*

61 THE UNITED STATES OF AMERICA,
*District of Louisiana:*

The President of the United States to Asahel P. Lyman, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a petition & a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein The Merchants' Mutual Insurance Company of New Orleans are plaintiffs in error, and you are defendant, to show cause, if any there be, why the judgment rendered against the said plaintiffs as in said petition & writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this second day of May, in the year of our Lord one thousand eight hundred and seventy-one.

E. H. DURELL, *Judge.*

62 (Indorsed:)

Asahal P. Lyman. United States circuit court. No. 6125. The Merchants' Mutual Ins. Co. of New Orleans, pl'ffs in error, vs. Asahel P. Lyman and David Swinerton. Citation.

*Marshal's return.*

Received, May 2, 1871, by the U. S. marshal, and on the 4th day, same month, and year, served a copy of the within citation in error on the within-named Asahel P. Lyman by delivering the same to E. C. Billings, his attorney, in person, at No. 82 Custom-house street, in this city.

New Orleans, May 4, 1871.

S. W. REED,
*D'y U. S. Marshal.*

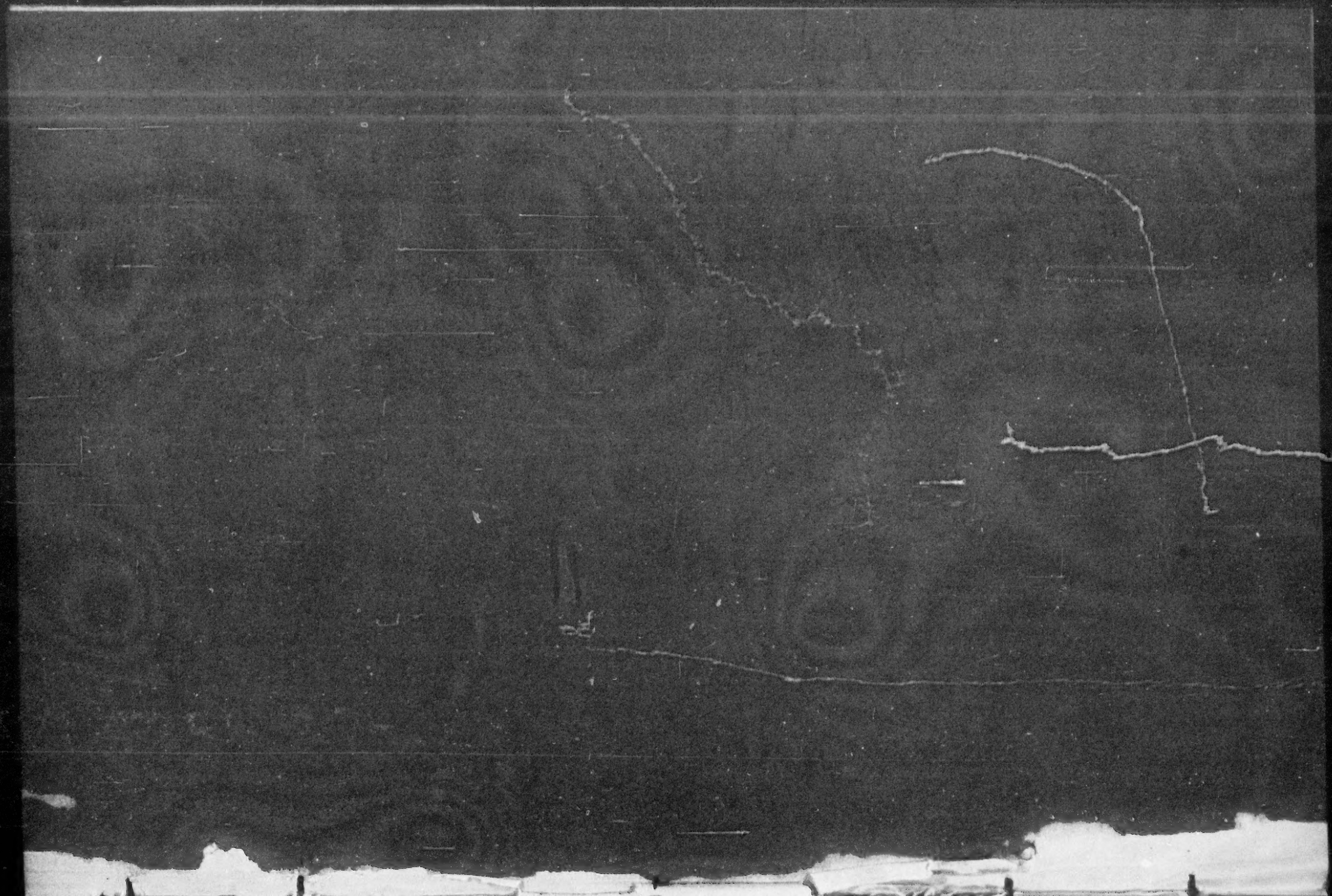
On this fourth day of May, 1871, personally appeared before me, the subscriber, S. W. Reed, and makes oath that he delivered a copy of the within citation as stated in his official return hereon.

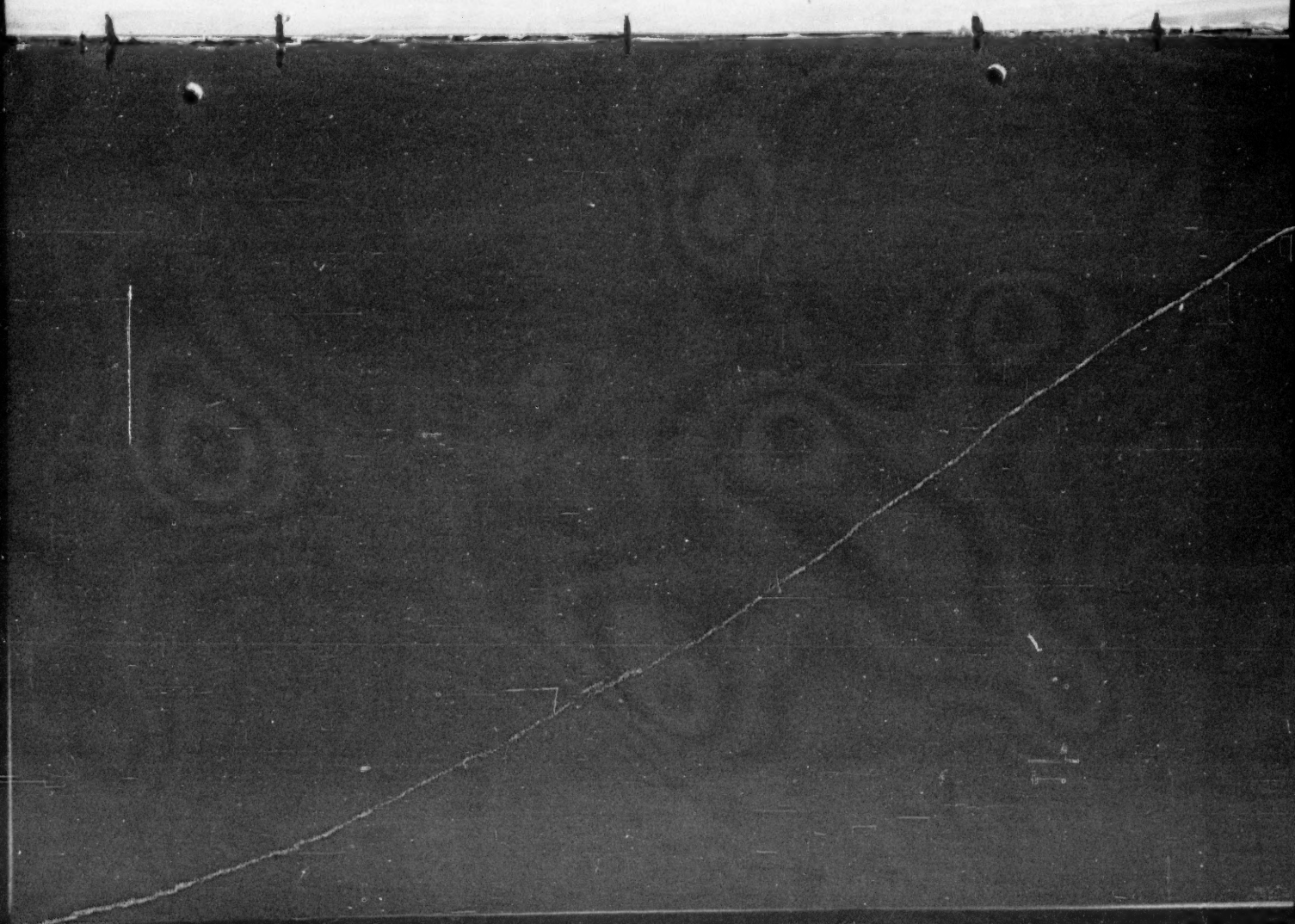
S. W. REED.

Sworn to and subscribed before me.

F. B. VINOT, *D'y Clk.*

(Indorsement on cover:) No. 375. The Merchants' Mutual Insurance Comp'y of New Orleans, plaintiffs in error, vs. Asahel P. Lyman and David Swinerton. Louisiana C. C. U. S. Filed 11th November, 1871.





Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y.

# Supreme Court

OF THE UNITED STATES.

| | |
|---|---|
| The Merchants' Mutual Insurance Company of New Orleans, Plff. in Error, *vs.* Asahel P. Lyman and David Swinerton, Defts. in Error. | No. 144. |

## Brief of Plaintiff in Error.

## STATEMENT.

The action was brought in the Circuit Court for the District of Louisiana, against the Merchants' Mutual Insurance Company, upon a policy of marine insurance in favor of Lyman & Swinerton.

The petition alleged that the Insurance Company issued a policy of insurance for $12,000 to the peti-

tioners, Lyman & Swinerton, upon the brig *Sailor Boy*, for two months, expiring January 1, 1870.

That on the 15th December, 1869, the plaintiffs applied to the company to insure them in the sum of $12,000, upon the same vessel for three months, from said 1st January, 1870.

That after taking time to consider, the company, on December 24, 1869, proposed to renew the insurance for the premium of $600, and that, on December 31st, the plaintiffs accepted this proposition for renewal, and the company, on that day, agreed with the plaintiffs that it would issue the policy, and make it out and send it to the petitioners' agents and receive the premium.

That on the 15th January, 1870, the plaintiffs sent for the policy and paid the premium, and the company issued to plaintiffs the policy annexed to the petition; that said policy is but a compliance with, and a formal statement of, the agreement to renew the insurance made December 31, 1869.

That on January 8th, 1870, the said brig, on a voyage from New York to New Orleans, became, by perils of the sea, an actual total loss; that proper proofs of loss have been submitted to the company and payment of the sum insured demanded, and judgment is prayed for the sum of $12,000 and interest.

Annexed to the petition, as Schedules A and B, are the two policies of insurance, viz., that dated October 30th, 1869, for two months, expiring January 1, 1870, and that dated January 15th, 1870, for three months, from January 1, 1870.

Rec., fols. 1–22.

The answer denies the allegation of the petition, and avers that the original insurance was not renewed before it expired, but that subsequently, and on the 15th January, 1870, the plaintiffs effected insurance on the said vessel for $12,000, for three months, at five per cent. premium, and received a new policy bearing the date of the application.

That before this application the vessel had been lost at sea, and that the plaintiffs concealed the fact, and fraudulently applied for and obtained said policy from the defendants, who were ignorant of the loss, and that said policy is void.

Rec., fols. 24–5.

The "Protest" of the Master, put in evidence, shows that the *Sailor Boy* sailed from New York for New Orleans, December 29th, 1869, and having met with some gales, was disabled and abandoned at sea on the 8th of January, 1870.

Rec., fols. 26–30.

The testimony of J. B. Gwynne, offered by the plaintiffs, was objected to by the defendant, and its admission, and its submission to the jury as evidence of a contract of insurance made on the 31st of December, before the loss, forms the subject of the bill of exceptions in the cause.

Rec. fols. 36–47.

It appeared by the testimony of this witness, that he, being employed, in some sort, as a clerk of L. J. Higby & Son of New Orleans, by their direction, took a letter from Capt. Swinerton to them, desiring to have the brig again insured, to defendants' office, on the 15th Dec., 1869, and showed it to the secretary of the company. Gwynne was instructed "to go to the office of the defendants *and see if they would renew the policy and get the rate*," and so told the secretary. "The secretary read the letter, and said they would renew the policy, but he could not give me the rate then, that he would send over to the office and let us know the rate."

Witness came away and brought the letter with him, and told Mr. Higby what he had done, and says: "I had nothing more to do with the matter till Dec. 31st."

What happened on the 31st December, is thus detailed by the witness:

"On the 31st of December, Mr. Higby told me to go and renew the policy. I went to the defendant's office on the 31st December, about half-past three in the afternoon, and asked to have the policy renewed. A clerk, or person standing at the desk, to whom I applied, told me *that the secretary had gone home, and that there was no one in the office who could do it, but that he would speak to the secretary when he came in, in the morning,* and have it attended to the first thing."

Nothing further was done until the 15th January, when L. J. Higby & Son (knowing of the loss of the brig on the 8th instant), sent Gwynne to the company for the policy. The witness states the transaction of that day as follows:

"I went around and went to the office of the defendants, and asked the man at the corner of the desk for the policy on the *Sailor Boy*. He turned over his book, but could not find it; said he would go and see the secretary. He went into the back office and returned with the secretary. The secretary said that he did not know that a policy had been ordered. I told him that I had ordered it the 31st of December. He said there had been no application made out. I told him I did not know anything about that; that no one said anything about an application to me. He said there should be one, and told the clerk to make one out for me to sign. Clerk made it out and I signed it, and paid the insurance, that is, the premium, by check of L. J. Higby & Son, for $510. The secretary asked me if anything had been heard from the vessel, I said, not that I knew of."

Rec., fols. 41–43.

Upon cross-examination, the witness testified that he was requested by the president of the company, after the loss had been demanded of the company, to come to the office and identify the person to whom he had made application on 31st December, but he was not able to recognize or identify any one as the person.

Rec., fols. 44–6.

To this evidence of Gwynne, as inadmissible, to vary the contract as made in writing on the 15th January, 1870, and as not showing any verbal or other contract prior to that date, and, for these reasons, not proper to go to the jury, the defendants objected, and thereupon the Judge, Durell, ruled as follows: "The plaintiffs put their entire case upon a verbal contract to renew the insurance made, as they allege, on the 31st day of December, eight days before the loss. They admit that when they sent for the written policy, on the 15th of January, they knew of the loss, and that they could not recover on the written policy standing by itself, but they say that the real contract was made on the 31st of December, and that they had a right to go to the jury on that issue," and overruled the objection, and admitted the testimony.

To this ruling the defendant excepted.

Rec., fol. 37-8.

A verdict was given, and judgment entered for the plaintiffs, for the sum insured, and interest.

Rec., fol. 51.

## Assignment of Errors.

*First.*—In admitting the evidence of the witness Gwynne of a parole contract of insurance of the same subject, and for the same risk between the same parties, as the written policy given in evidence by the plaintiffs.

*Second.*—In submitting to the jury the evidence of Gwynne as showing or tending to show a contract of insurance by the defendant, made on the 31st of December, when said evidence shows no such contract, but, on the contrary, a failure to make any contract, or to treat concerning such a contract.

## POINTS.

**First.**—It may be considered as settled, by the best authority, that a parole contract of insurance is valid, and that a parole agreement for a policy is also valid, and will be enforced in equity, if not at law.

Com. Mut. Mar. Ins. Co. *vs.* Union Mut. Ins. Co., 19 How., 318.
Taylor *vs.* Mut. F. Ins. Co., 9 Id., 390.
First Bapt. Ch. *vs.* Brook. F. Ins. Co., 19 N. Y., 305.
28 Id., 153.

**Second.**—But in this case, the plaintiff had a complete written contract, made on the 15th day of January, upon a written application for insurance made on that day, and by a policy bearing date on that day, delivered thereafter.

It is impossible to admit parole evidence of antecedent negotiations between the same parties, complete or incomplete, for a contract in the same premises. The executed and consummated policy of January 15, 1870, supersedes and occupies the ground of all previous parole negotiations.

**Third.**—The fact that the contract of insurance, made on the 15th of January is void, from the fraud of the assured in concealing the loss, does not make it any the less the written contract of the parties, and of that date, nor affect its efficacy, under the rules of evidence to exclude parole evidence of a prior contract.

**Fourth.**—But, the parole evidence admitted, so far from proving, or tending to prove, a parole contract, made on the 31st of December, expressly shows that the defendant made no contract on that day, and did not participate in any treaty or negotiation for such a contract.

It is conceded, that if a contract was not made on that day, it was never made.

The evidence should, as a matter of law, have been excluded by the Court. "Whether there be *any* evidence is a question for the Judge, whether there be sufficient evidence is for the jury."

Chandler *vs.* Von Roeder, 24 How., 224.

**Fifth.**—The policy of January 15th, in its terms, covered the loss of the brig on the 8th January, as it was an insurance, "lost or not lost." The only defect in it as a contract was the fraudulent concealment by which it was procured.

**Sixth.**—But in those provisions of the policy in which the date becomes material, it is impossible to adjust the policy of January 15th, to the pretension that its true date is of December 31st, preceding.

Thus, the provisions in the policy (fols. 19, 20), for the effect of *prior and subsequent* insurances of the risks must be assigned to the date of January 15th, and cannot be transferred to the date of December 31st, preceding.

**Seventh.**—The attempt of the plaintiffs to connect the contract of January 15, (which, *of that date, and upon its own negotiations*, is vitiated by flagrant frauds), with any previous insufficient or unsuccessful attempts at effecting the insurance, utterly fails. The subsequent fraudulent contract cannot communicate either vigor or prosperity to the debility or misfortune of the previous efforts.

The question, whether a contract of insurance had been completed in and by the application *sought to be made*, on the 31st of December, begins and ends on that day. If, by what occurred *then*, the plaintiffs *had* effected insurance, and were entitled to a policy, their present pretensions would be intelligible.

But the proof shows that all that happened on that day, was that the messenger of plaintiffs *going to the insurance office, after business hours, failed to find any one with whom to treat concerning the insurance.*

The conduct of the plaintiffs' agents in the transaction of January 15th, conclusively shows their consciousness that their own inattention and neglect had left them without insurance effected, until by the occurrence of the loss, it had become impossible.

However much this misfortune may be lamented, the responsibility for it cannot be shifted from the agents to the insurance company.

**Last Point.**—The judgment should be reversed, the verdict set aside, and a new trial ordered.

Wm. M. Evarts,
Of Counsel
for Plaintiff in error.

IN THE HONORABLE THE

# Supreme Court of the United States.

THE MERCHANTS' MUTUAL INSURANCE COMPANY OF NEW ORLEANS, PLAINTIFFS IN ERROR,
*vs.*
ASAHEL P. LYMAN AND DAVID SWINERTON.
} *No.* —

**In Error to the Circuit Court of the United States for the State of Louisiana.**

## *Brief of Counsel of Defendants in Error.*

### I.—STATEMENT OF THE CASE.

The defendants in error, in their petition to the court below, averred that on 30th October, 1869, the Merchants' Mutual Insurance Company of New Orleans took a risk upon their brig *Sailor Boy* for $12,000, until 1st January, 1870.

They aver further that on the 15th December, 1869, they applied by their agents, Higby & Son, for a renewal of the policy from the 1st January, 1870.

That on the 24th December, 1869, the Insurance Company answered the application, that they would agree to the renewed risk for a premium of $600, which on the 31st December, 1869, defendants in error assented to; and the company promised to send a policy in due form.

That on the 15th January, 1870, Higby & Son, agents

of defendants in er , sent for the policy, received it, and paid the premium of $600.

They aver that the vessel was lost by the perils insured against on the 8th January, 1870.

See pt. Rec., pp. 1 and 2.

The policy is annexed to the petition and is marked B.

See pp. 5 to 8.

The answer of the company averred that the policy of insurance which expired on the 1st January, 1870, was not renewed; that the defendants in error effected an insurance on the 15th January, 1870, but fraudulently concealed the fact, well known to them, that the vessel had been lost on the 8th of the same month.

See Rec., pp. 9 and 10.

There was judgment against the company for $12,000, (see Rec., p. 19,) and they have procured the record to be removed to this court.

II.—Counsel submits the following Points and Authorities.

A. By the language of the judgment on p. 19 of the Record, it might be supposed that the case was tried by a jury who gave a verdict in favor of plaintiffs below, defendants in error here, but no trace can be found in the record of the summoning or empannelling of a jury, or of a verdict; and if the case was really tried by a jury the court here has not such a return to the writ of error as is required by the eighth rule. However, when we look to the clerk's certificate, (see Rec., p. 21,) we find that the record, such as it is, presented to us is a full, complete, true, and perfect transcript of the record and proceedings had on the trial; and this certificate being uncontroverted, seems to show that the case was not tried by a jury.

It is thus apparently certain that the case was tried by the court alone, as is most generally the case in Louisiana, and there being no compliance with the requirements of the act of March 3, 1865, (13 Statutes at Large, p. 501,) the judgment of the lower court is not subject to review here.

B. If the case was really tried by a jury, and that sufficiently appears upon the record, then the only question in this court is the ruling of the judge below on the exceptions of the company to a deposition offered in evidence by the petitioner.

The depositions are annexed to the bill of exceptions, and are found on pp. 14 to 17 of the Record.

The objection to the admission of the deposition was, that it tended to show a verbal contract; that there was a written contract of insurance between the parties, and that plaintiffs could not show a previous verbal contract.

See the Bill of Exceptions, Rec., p. 14.

The court below held the plaintiffs had put their entire case on a verbal contract, made on 31st December, 1869, eight days before the loss, and had a right to offer proof of it.

P. 14.

The plaintiffs had insured their vessel with defendant's company until 1st January, 1870.

On the 15th December, previous to the expiration of the policy, plaintiffs' agents, Higby & Son, applied for a renewal for three months from 1st January, 1870.

Nine days after, on 24th December, 1869, defendants informed plaintiffs' agent they would make the renewal for a premium of $600.

On 31st December, 1869, plaintiffs' agent informed defendants' company they accepted the company's proposal for renewal at $600 premium, and then promised to make out the written renewed policy and send it to the office of Higby & Sons.

The company delayed to send the renewed policy, and on the 15th January, 1872, plaintiffs' agent sent for the policy, paid the $600, and received the policy.

The foregoing statement of facts appears in the deposition of Gwynne annexed to defendants' bill of exceptions, (see Rec., pp. 15 to 17,) and they show a complete contract on the 31st December, 1869.

The evidence was not offered in the court below to contradict the written contract, as the bill of exceptions states, but to show the circumstances under which it was made, and to show to what state of facts it really referred, by explaining that the instrument, made on the 15th January, only put in writing what had been agreed to between the parties on the 31st December previous, to which date and fact the policy related back.

Corporations may contract by parole, and an agreement to issue a policy is as binding as the instrument itself.

Bank of Columbia *vs.* Patterson, 7 Cranch, p. 305.

Hamilton *vs.* Lycoming Insurance Company, 5 Barr, (Pa.,) 344.

The Commercial Mutual Insurance Company *vs.* Union Mutual Insurance Company, 19 Howard, 318.

The payment of the premium on the 31st December, when the agreement to insure was made, was not essential; it could be paid at any time.

See 19 Howard, 318.

The plaintiffs in the court below relied on an agreement to insure, made on 31st December, 1869, and they had a right to offer evidence to prove it.

If, then, the case was tried by the court alone, or by the court and jury, either way, the judgment below should be affirmed.

Respectfully submitted.

THOMAS J. DURANT,
*for Defendants in Error.*